Supreme Court, U.S.
FILED
95-78 JUN 19 1995

No. 95-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

VALENTINO COLOROW,
Petitioner,

v.

STATE OF UTAH and JAN GRAHAM, Utah Attorney General,
Respondents.

On Petition For Writ of Certiorari
To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

JEROME H. MOONEY
Counsel of Record
WENDY M. LEWIS
MOONEY LAW FIRM, P.C.
50 West Broadway, 4th Floor
Salt Lake City, UT 84101-2006
(801) 364-6500

June 19, 1995

Attorneys for Petitioner

70pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the defendant's right to be tried in the jurisdiction where the offense occurred, where jurisdiction and the elements of the offense charged are inescapably intertwined, reaches a constitutional magnitude pursuant to the Sixth Amendment and Article III, § 2 of the United States Constitution, so as to invoke the requirement that the determination be submitted to the trier of fact.

II. Whether the State of Utah may legislatively reverse the burden of proof of facts underlying jurisdiction by means of a non-rebuttable presumption that provides that for purposes of jurisdiction in a case of criminal homicide, the death occurred in the state where the body is found, without violating the defendant's due process rights under the Fifth and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

Petitioner, Valentino Colorow, is the defendant in the action pending in the Eighth Judicial District Court of Uintah County, State of Utah, Case No. 941800319, and is the real party in interest in the Petition for Extraordinary Relief in the Supreme Court of the State of Utah, Case No. 950042.

The Honorable A. Lynn Payne, Judge, Eighth Judicial District Court, Uintah County, State of Utah, is the presiding Judge in the action pending in that court and the Respondent in the Petition for Extraordinary Relief in the Supreme Court of the State of Utah.

Respondent, State of Utah, is the plaintiff in the action pending in the Eighth Judicial District Court of Uintah County, State of Utah, Case No. 941800319; and the Petitioner in the Petition for Extraordinary Relief in the Supreme Court of the State of Utah.

Respondent, Jan Graham, is the Attorney General of the State of Utah and a Petitioner in the Petition for Extraordinary Relief in the court below.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS ..... iii-iv

TABLE OF AUTHORITIES ..... v-vii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

Statement of Facts 4

Procedural History and the Rulings Below 8

REASONS FOR GRANTING THE WRIT 12

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE STATES 12

TABLE OF CONTENTS
(continued)

Page(s)

II. THERE IS AN IMPORTANT QUESTION OF DUE PROCESS SURROUNDING THE ISSUE OF WHETHER STATES MAY LEGISLATIVELY REVERSE THE BURDEN OF PROOF UNDERLYING JURISDICTION 21

CONCLUSION 25

APPENDIX 26-62

TABLE OF AUTHORITIES

Page(s)

Cases

Brown Shoe Co. v. United States, 370 U.S. 294, 305-306, 82 S.Ct. 1502, 1513, 8 L.Ed.2d 510 (1962) 12

Commonwealth v. Bighum, 452 Pa. 544, 307 A.2d 255 (Pa. 1973) 14, 15

Conrad v. State, 262 Ind. 446, 317 N.E.2d 789 (Ind. 1974) 15

Crawford v. United States, 796 F.2d 924 (7th Cir. 1986) 16

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 108 S.Ct. 1704, 1708 (1988) 12, 13

Hagen v. Utah, 114 S.Ct. 958 (1994), *reh'g denied*, 114 S.Ct. 1580 (Apr. 18, 1994) 20

In Re Winship, 397 U.S. 358, 373 (1970) 22, 23, 24

Lane v. State, 388 So.2d 1022 (Fla. 1980) 15

Patsy v. Board of Regents of the State of Florida, 57 U.S. 496, 102 S.Ct. 2557, 2572 (1982) 13

TABLE OF AUTHORITIES
(continued)

Page(s)

People v. Cullen, 695 P.2d 750 (Co. App. 1984) 14

People v. Ribowsky, 568 N.E.2d 1197 (N.Y. 1991) ... 15

Sandstrom v. Montana, 442 U.S. 510 (1979) 23, 24

State v. Alagao, 883 P.2d 682 (Hawaii App. 1994) 16, 17

State v. Lane, 771 P.2d 1150 (Wash. 1989) 14

United States v. Barone, 1994 WL 597726 (9th Cir. Nov. 3, 1994) 16

United States of America v. Johnson, 323 U.S. 273, 276 (1944) 19

Statutes

Arizona Rev. Stat. Ann., § 13-108B 21

Colorado Rev. Stat. Ann., § 18-1-201(2) 21

Kansas Stat. Ann., § 21-3104B 21

Montana Code Ann., § 46-2-101(2) 21

Utah Code Ann. § 76-1-201(2)(1994) . 4,9,11,21,32,38,43

TABLE OF AUTHORITIES
(Continued)

Page(s)

Utah Code Ann., § 76-1-501(3) (1994) 4, 9, 32

Utah Code Ann., § 76-5-203(1)(a)(b)(c) 5

Utah Code Ann., § 76-5-302 ..... 5, 30

28 U.S.C. § 1257(a) 2

Constitutional

U.S. Constitution, Article III § 2 ..... 2, 17

U.S. Constitution, Fifth Amendment 3, 22, 33

U.S. Constitution, Sixth Amendment 2, 18

U.S. Constitution, Fourteenth Amendment 3, 22, 23

Other

Wright, Federal Practice and Procedure;
Criminal 2nd, Chpt. 6, Section 301 18

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment entered by the Supreme Court of the State of Utah in this proceeding.

OPINIONS BELOW

The Supreme Court of the State of Utah has issued an opinion in this case, a copy of which appears in Appendix A to this Petition. The opinion has not yet been reported. The prior opinion of the Eighth Judicial District Court of Uintah County State of Utah, entered January 5, 1995, Case Number 941800319, is unpublished, and is reprinted in Appendix B to this Petition. The subsequent opinion of the Eighth Judicial District Court of Uintah County, State of Utah, clarifying its January 5, 1995 opinion, and entered January 19, 1995, Case Number 941800319, is unpublished, and is reprinted in Appendix C to this Petition.

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Utah was entered on March 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Constitutional and Statutory provisions:

1. Article III § 2 of the United States Constitution which provides that:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State were the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. The Sixth Amendment to the United States Constitution which provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

3. The Fifth Amendment to the United States Constitution which provides in pertinent part as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law. . . .

4. The first section of the Fourteenth Amendment to the United States Constitution which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

> the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. *Utah Code Ann.* § 76-1-501(3) (1994) which provides that:

> The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence.

6. *Utah Code Ann.* § 76-1-201(2) (1994) which provides in pertinent part that:

> If the body of a homicide victim if found within the state, the death shall be presumed to have occurred within the state.

STATEMENT OF THE CASE

Statement of Facts

This action arose out of charges filed in the Eighth Judicial District court in and for Uintah County, State of

Utah, against Valentino Colorow for Murder in the First Degree in violation of *Utah Code Ann.*, § 76-5-203(1)(a), (b) or (c), and Aggravated Kidnapping in violation of *Utah Code Ann.*, § 76-5-302. The events leading to these charges were as follows: On or about January 23, 1994, a party occurred at the home of Delphine Colorow on the Uintah Urray Indian Reservation. There were approximately eight people present at this party including the defendant, Valentino Colorow; Delphine Colorow and Dominic Manning who were charged as parties by separate informations with the same offenses; and the victim Bill Poleviayoma. The three defendants and the victim are all tribal members. During the course of this party a fight broke out with the victim and at least one of the three defendants. At some point during the fight the victim was taken out onto the front porch of Delphine Colorow's

home. Shortly thereafter the victim was stabbed multiple times in the neck with a screwdriver. The location of the Colorow home is on Indian Trust Land. The victim, or his body, was then loaded into the trunk of a car and taken approximately four miles away to the Gusher Dump which is located off of Indian trust land and on Utah State land. At the Gusher Dump the body was placed on the ground, at which time his head was beaten with a tire rim. Which of the defendants participated in any of the conduct is in dispute.

The victim was reported missing on or about January 25, 1994, however, the body was not located until on or about May 20, 1994. At the time the body was located it was severely decomposed and the head was essentially missing. Due in part to the condition of the body at the time it was located, it is unknown and highly disputed which

conduct caused the death of the victim. The stabbing which took place on Indian trust land, or the injuries to the head which occurred on State land. At the preliminary hearing, the Utah State Medical Examiner, Dr. Todd C. Grey, testified that due to the degree of decomposition of the victim's body he was unable to determine whether the injuries which the victim sustained in the neck area would have been fatal. Dr. Grey further testified that it was not possible to tell whether the injuries to the head occurred prior to the victim's death as opposed to an hour or two after death. (Preliminary Hearing Trans. p.25, reprinted in Appendix D). The State has alleged that the death occurred as a result of conduct at the Gusher Dump. Testimony will be presented at trial however, that the victim was dead at the time he was loaded into the trunk of the car before being driven to the dump where the body was ultimately

found.

Procedural History and the Rulings Below

The defendant, Valentino Colorow, was arrested on or about June 11, 1994 at the residence of his father in Fort Duchenne, Utah. The defendant was then charged with the offenses listed above. A trial date was scheduled for January 3, 1995. On or about December 15, 1994, the State of Utah filed a Motion in Limine to prohibit argument on the question of jurisdiction by the defense. The defendant filed a Response on or about December 22, 1994. On or about December 28, 1994, the district court held a hearing on the motion. After hearing arguments from both sides, the district court ruled from the bench that jurisdiction, when founded on a factual dispute was a question for the jury which must be established by the prosecution by a

preponderance of the evidence.[1] Further, that the presumption that if the body of a homicide victim is found within the state, the death shall be presumed to have occurred within the state that is set forth at *Utah Code Ann.*, § 76-1-201(2) is a rebuttable presumption. Based upon that ruling, on or about December 30, 1994 the State requested a stay in the proceedings so that a Petition for Extraordinary Writ (Mandamus) could be filed in the Supreme Court for the State of Utah. The district court granted the stay and entered a written ruling on or about January 5, 1995. The State filed a Motion to Reconsider and Motion to Determine Jurisdiction in the district court on or about January 13, 1995. The defendant objected to said motion on

---

[1] Utah law provides that "the existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence." *Utah Code Ann.* § 76-1-501(3) (1994).

or about January 19, 1995. The district court entered a ruling clarifying its January 5, 1995 ruling on or about January 19, 1995. Thereafter, the State of Utah and Jan Graham, Utah Attorney General, filed a Petition for Extraordinary Writ on or about January 26, 1995. Valentino Colorow, as the real party in interest filed a Response on or about February 17, 1995, as did the Honorable A. Lynn Payne. The Supreme Court of the State of Utah heard oral argument in this matter on or about March 6, 1995 and issued an opinion on or about March 21, 1995.

In its March 21 opinion, the Supreme Court of the State of Utah granted the State's Petition for Extraordinary Relief directing the district court to decide, as a preliminary and non-final matter, whether it has jurisdiction over the crime at issue. The Court further directed that during this preliminary determination, the State must adduce sufficient

evidence to demonstrate by a preponderance of the evidence that jurisdiction is proper and the trial should go forward. If the State meets this burden the trial should go forward, however, if at any time during the trial it were to become apparent that the initial determination as to jurisdiction was improper, the district court must immediately dismiss the action. The Supreme Court of the State of Utah further held that the presumption set out in *Utah Code Ann.*, § 76-1-201(2) that provides that "if the body of a homicide victim is found within the state, the death shall be presumed to have occurred within the state", serves to "tip the scales" in favor of a finding that jurisdiction is proper in the case where there is no evidence as to the place of death or where the evidence regarding the place of death weighs equally in favor of jurisdiction and nonjurisdiction. This opinion appears at Appendix A of this

Petition.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE STATES

The question of jurisdiction has long been considered a threshold issue. It is an issue of such fundamental importance in our system that it can be raised at any time throughout the proceedings. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 305-306, 82 S.Ct. 1502, 1513, 8 L.Ed.2d 510 (1962) in which this Court held in an opinion delivered by Justice Warren that even when all parties had consented to the Court's jurisdiction that "a review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before us." *Id. See also Goodyear Atomic*

Corp. v. Miller, 486 U.S. 174, 108 S.Ct. 1704, 1708 (1988) (jurisdiction must independently be determined as a threshold matter). In determining the question of jurisdiction this Court has further held that "[q]uestions of jurisdiction and of the legitimate exercise of power are fundamental in our federal constitutional system." *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 2572 (1982). Although the importance of the jurisdiction question is well settled, who makes that determination in the situation where jurisdiction and the facts are inescapably intertwined is uncertain.

Although state courts have uniformly held that jurisdiction is normally a legal issue and therefore not a concern for the jury, courts are split on who should handle the question in the rare instance when jurisdiction depends on the resolution of a factual dispute. The Supreme Court

of Pennsylvania held in *Commonwealth v. Bighum*, 307 A.2d 255 (Pa. 1973) that although jurisdiction in not normally a concern for the jury, "in those infrequent cases where jurisdiction depends upon the resolution of disputed facts, it is within the province of the jury to resolve the issue under proper instructions, and failure to give such instructions may constitute reversible error." *Id.* At 258. The Supreme Court of the State of Washington has also held that if jurisdiction depends on the resolution of disputed facts it is an issue for the jury. *See State v. Lane*, 771 P.2d 1150 (Wash. 1989) (uncontested facts so overwhelmingly supported jurisdiction it was not plain error in the case at hand to fail to submit the question to the jury). In *People v. Cullen*, 695 P.2d 750 (Co. App. 1984), the Colorado Court of Appeals followed the lead of Pennsylvania, Florida and Indiana, in holding "[w]here

determination of jurisdiction depends upon a resolution of disputed facts, the issue must be submitted to the jury with an appropriate instruction, regardless of whether it was raised by the defendant." *Id.* At 751, *citing Commonwealth v. Bighum*, 452 Pa. 544, 307 A.2d 255 (Pa. 1973); *Lane v. State*, 388 So.2d 1022 (Fla. 1980) and *Conrad v. State,* 262 Ind. 446, 317 N.E.2d 789 (Ind. 1974). The Court of Appeals of New York has gone so far to hold that in certain instances venue may be a question for the jury.

> Generally, it is for the jury to decide as a matter of fact, the place where the crime was committed. . . or any other fact relevant to venue. . . . When defendant has requested that venue be submitted to them, it is doubtful that it would ever be proper for the court to decide the question as a matter of law. . . .

People v. Ribowsky, 568 N.E. 2d 1197 (N.Y. 1991).

Although federal courts have not dealt with this issue to any large extent, both the Ninth Circuit and the Seventh Circuit have held that jurisdiction should be decided by the jury when it depends on the resolution of factual disputes. *See United States v. Barone*, 1994 WL 597726 (9th Cir. Nov. 3, 1994) (when jurisdictional question is intertwined with the merits it must be resolved by the jury), and *Crawford v. United States*, 796 F.2d 924 (7th Cir. 1986) (although the court should typically resolve jurisdictional questions in some cases the jurisdictional issue will be so bound up with the merits that a full trial on the merits may be necessary to resolve the issue).

To date, only the Intermediate Court of Appeals of Hawaii has taken the position taken by the Supreme Court of Utah in its March 21, 1994 opinion. In *State v. Alagao*, 883 P.2d 682 (Hawaii App. 1994), the Hawaii court of

Appeals held that "any factual dispute upon which the existence of jurisdiction may turn is for the court alone, and not a jury, to determine." *Id.* at 684. Certiorari should be granted to resolve this conflict between the states because the jurisdictional question in the context of a factual dispute presents an issue which invokes a defendant's Constitutional right to require that the issue be determined by the trier of fact.

The importance of jurisdictional and venue issues in criminal cases go back to the framing of the Constitution. These questions have such deep historical roots that they can not be ignored in making these determinations.

> "The Framers thought it so important that a person be tried where the crime was committed that they put this in the Constitution at two places. Article III, Section 2, of the Constitution requires that 'the Trial of all Crimes. . . shall be held in the State where the said Crimes shall have been

> committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.' The Sixth Amendment provides in part that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law. . .' "

Wright, Federal Practice and Procedure; Criminal 2nd, Chpt. 6, Section 301. In 1944 this Court discussed at length the importance of the jurisdictional and venue question in criminal cases.

> These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges, and Congress had not been unmindful of them. Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation

> must be construed. If an enactment of congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.

United States of America v. Johnson, 323 U.S. 273, 276 (1944).

The contradictory standards set forth by the courts below lead to confusion, and more importantly, a violation of the Constitutional principles enacted by the Framers of the Constitution. Jurisdiction is much more than a procedural issue. It is the place at which justice begins in our criminal system. Although some States, including Utah, have determined that jurisdiction is not an element to be proven beyond a reasonable doubt, given the historical context of jurisdictional issues it has been and should be treated as something of a great magnitude at least

equivalent to an element of a criminal charge. The defendant has an absolute constitutional right to be tried in the jurisdiction where the crime was committed. Who answers the question of where the crime was committed in the rare situation when that answer can not be determined absent a determination on the essential elements of the offense should be resolved by this Court in order to avoid further conflict regarding this important Constitutional issue.[2]

---

[2] This is not the first time that this court has dealt with jurisdictional issues revolving around the Uintah Indian Reservation in Utah, and actions by the State of Utah to extend its authority over actions occurring in Indian country. In *Hagen v. Utah*, 114 S.Ct. 958 (1994) this Court held that the Uintah Indian Reservation was diminished by Congress when it was opened to non Indian settlers at the turn of the Century. This opinion was to lesson the confusion around who had jurisdiction over crimes committed in Indian Country; however, because of the checkerboard nature of the Reservation it is essential that the further determination of who decides jurisdiction in cases such as this one be made in order to complete and clarify what was intended at least in part by the *Hagen* decision.

II.

THERE IS AN IMPORTANT QUESTION OF DUE PROCESS SURROUNDING THE ISSUE OF WHETHER STATES MAY LEGISLATIVELY REVERSE THE BURDEN OF PROOF UNDERLYING JURISDICTION

Although a handful of states have enacted legislation similar to that provided for in *Utah Code Ann.*, § 76-1-201(2),[3] the Supreme Court of Utah is the only court to have held that the presumption - "if the body of a homicide victim is found within the state, the death shall be presumed to have occurred within the state"- acts as a tie breaker, or to "tip the scales" in favor of a finding that jurisdiction is proper in the situation where the evidence regarding the place of death weighs equally in favor of jurisdiction and

---

[3] *See e.g. Kansas Stat. Ann.*, § 21-3104B; *Montana Code Ann.*, §46-2-101(2); *Colorado Rev. Stat. Ann.*, § 18-1-201(2) and *Arizona Rev. Stat. Ann.*, § 13-108B.

nonjurisdiction. In so holding, the Supreme Court of the State of Utah has departed from the long standing Constitutionally recognized principle that the State carries the burden of proof in all criminal proceedings.

Although the State of Utah has legislatively determined that jurisdiction need only be proven by a preponderance of the evidence, the holding of the Utah Supreme Court relieves the State of even that burden. The Court's holding in this case creates a situation where the State will never have to concern themselves with meeting their burden on the jurisdictional question. This holding is in opposition to the very core of our criminal justice system and our Constitution. This is no more than a simple issue of due process under the Fifth and Fourteenth Amendments that dates back to our "early years as a nation." *In Re Winship*, 397 U.S. 358, 373 (1970). *Winship* went on to

hold that "it is the duty of the government to establish . . . guilt . . . . This notion-basic in our law and rightly one of the boasts of a free society-is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Id.* at 362, *citations omitted.*

The Supreme Court of the State of Utah's ruling is also directly contradictory to this Court's ruling in *Sandstrom v. Montana*, 442 U.S. 510 (1979). In *Sandstrom*, the United States Supreme Court dealt with a Montana statute that stated "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 513. The petitioner in *Sandstrom* argued that the instruction had the affect of shifting the burden of proof on the issue of purpose or knowledge to the defendant and that was a violation of due process under the Fourteenth Amendment to the U.S. Constitution. The U.S. Supreme

Court agreed holding that "[b]oth federal and state courts have held under a variety of rationales, that the giving of an instruction similar to that challenged here is fatal to the validity of a criminal conviction." *Id.* The court went on to hold that:

> A conclusive presumption . . . would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime and would invade [the] fact finding function which in a criminal case the law assigns solely to the jury.

Id. at 523. Although in Utah, jurisdiction is to be proven by a preponderance of the evidence as opposed to by a reasonable doubt, it is still a factor which the State has the burden of proving.

The ruling by the Utah Supreme Court is in direct violation of the Constitutional and Due Process principles set forth by this Court in *Winship* and beyond.

Because the determination of this issue is necessary to preserve the Constitutional principles that developed in our earliest history certiorari should be granted resolve the question presented.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED this 19th day of June, 1995.

JEROME H. MOONEY
Counsel of Record
WENDY M. LEWIS
MOONEY LAW FIRM, P.C.
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84101-2006
Telephone: (801) 364-6500

Attorneys for Petititioner

APPENDIX

Page

A. Opinion of the Supreme Court of the State of Utah 27

B. Ruling of the Eighth Judicial District Court (dated 01/05/95) 35

C. Ruling of the Eighth Judicial District Court (dated 01/19/95) 50

D. Preliminary Hearing Transcript at Page 25 60

This opinion is subject to revision before final publication in the Pacific Reporter

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

State of Utah and Jan Graham, Utah Attorney General,
Petitioners,

v.

The Honorable A. Lynn Payne, Eighth Judicial District Court, Uintah County, Utah,
Respondents.

No. 950042

F I L E D
March 21, 1995

Geoffrey J. Butler, Clerk

Original Proceeding in this Court

Attorneys: Jan Graham, Att'y Gen., Carol Clawson, J. Kevin Murphy, Asst. Att'ys Gen., Salt Lake City, for plaintiffs
Brent M. Johnson, Salt Lake City, for defendant Jerome H. Mooney, Wendy M. Lewis,

Salt Lake City, for Valentino Colorow

ZIMMERMAN, Chief Justice:

Petitioners the State of Utah and Jan Graham, the Utah Attorney General, bring this petition for extraordinary relief pursuant to rule 65B(e) of the Utah Rules of Civil Procedure.[4]

---

[4] Rule 65B(e) provides in pertinent part as follows:

> Wrongful use of judicial authority or failure to comply with duty.
>
> (1) Who may petition.
>
> A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph (e) may petition the court for relief.
>
> (2) Grounds for relief.
>
> Appropriate relief may be granted:
>
> (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its

Petitioners contend that the district court "failed to perform an act required by law as a duty of office"[5] when it refused to decide if it had jurisdiction over the second degree murder and aggravated kidnapping prosecution in State v. Colorow, 941800319 (D. Ct. filed June 10, 1994). We grant the petition and direct the district court to decide the jurisdictional issue in accordance with the dictates of this opinion.

Valentino Colorow, a member of the Ute

> jurisdiction or abused its discretion; (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; or (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled.

[5] Utah R. Civ. P. 65(B)(e)(2)(B).

Indian tribe, is charged in the Eighth District Court with murder, Utah Code Ann. § 76-5-203, and aggravated kidnapping, id. § 76-5-302, both first degree felonies. The parties agree that the victim, also a Ute Indian, died by criminal homicide. There is, however, an unresolved questions: to wit, did the victim die in Utah state territory, thereby giving the state district court jurisdiction to try the offense, or within federal Indian trust land, thereby giving the federal district court for the district of Utah jurisdiction to try the offense?[6]

In response to the jurisdictional uncertainty, the State filed a motion in limine, asking the district court to decide the question of jurisdiction before trial. The district court declined to decide whether the state had jurisdiction, ruling instead that jurisdiction is a jury questions:

> [A]ssuming the issue is properly raised by the Defendant; in order to establish jurisdiction in this case, the State must

---

[6] The victim received two potentially fatal injuries, one within the bounds of Indian trust land and one within the bounds of the state of Utah.

> prove by a preponderance of the evidence: 1. The offense occurred within the exterior boundaries of the State of Utah; and 2. The offense or some required element of the offense occurred outside the reservation. The issue of whether the State has met its burden of proving the above is for the jury to decide. The Court will determine whether the Defendant has properly raised the issue.

Finding itself without any other avenue to challenge the district court's ruling, the State invokes the extraordinary writ process, contending that the district court "failed to perform an act required by law as a duty of office" when it delegated the question of jurisdiction to the jury.

We agree with the State that the district court "failed to perform an act required by law as a duty of office" when it delegated the issue of jurisdiction to the jury. Whether a district court has jurisdiction to hear a criminal mater is a question of law for the court. See State v. Humphrey, 823 P.2d 464, 465-66 (Utah 1991); see also Salt Lake City Corp. V. Leahy, 848 P.2d 179, 180 (Utah Ct. App. 1993). Accordingly, it is the court, not

the jury, that must determine whether jurisdiction is proper. If resolution of a factual dispute is necessary to settle the jurisdictional question, it is the court, not the jury, that must resolve the dispute. State v. Alagao, 883, P.2d 682, 684 (Haw. Ct. App. 1994).

We therefore direct the district court to decide, as a preliminary and nonfinal matter, whether it has jurisdiction over the crime at issue here. During this preliminary determination,, the State must adduce sufficient evidence to demonstrate by a preponderance of the evidence that jurisdiction is proper and the trial should go forward.[7] Utah Code Ann. § 76-1-501(3). If the State meets that burden, the

---

[7] The State is aided in its proof on this issue by the presumption set out in section 76-1-201(2) of the Code. That section provides that "if the body of a homicide victim is found within the state, the death shall be presumed to have occurred within the state." Utah Code Ann. § 76-1-201(2). Thus, where there is no evidence as to place of death or where the evidence regarding the place of death weighs equally in favor of jurisdiction and nonjurisdiction, the statutory presumption will serve to "tip the scales" in favor of a finding that jurisdiction is proper.

district court should allow the case to proceed to trial. If, however, it becomes apparent at any point during the course of the trial that the initial determination as to jurisdiction was improper, the district court must immediately dismiss the action. See Leahy, 848 P.2d at 180.[8]

---

[8] During oral arguments before this court, the State expressed some hesitation about

(Continued on the next page.)

(Footnote continued)

proceeding to trial without a final determination as to jurisdiction. This hesitation seemed to be based on the double jeopardy implications of proceeding to trial and then dismissing the action at some later date if the district court determines that it is without jurisdiction. We conclude that there is no basis for such a concern. Where a criminal defendant was "never tried by a court of competent jurisdiction, retrial is appropriate and does not violate" the Fifth Amendment to the United States Constitution. State v. Cockrell, 689 P.2d 32, 35-36 (Wash. 1984) (en banc) (citing Serfass v. United States, 420 U.S. 377, 391-92 (1975)); accord State v. Ambrose, 598 P.2nd 354, 358 (Utah 1979) ("It is well established in Utah that jeopardy attaches when an accused is put on trial in a court of competent jurisdiction, upon a valid indictment (or information),

The writ is hereby granted, and the district court is directed to proceed in accord with this opinion.

WE CONCUR:

I. Daniel Stewart,
Associate Chief Justice

Richard C. Howe, Justice

Christine M. Durham, Justice

Leonard H. Russon, Justice

---

and a jury has been sworn and impaneled." (emphasis added)).

In The Eighth Judicial District Court
Of Uintah County, State of Utah

STATE OF UTAH,	:	
	:	
Plaintiff,	:	**RULING**
	:	
vs.	:	
	:	
VALENTINO COLOROW,	:	**Case No.**
	:	
Defendant.	:	

This matter came before the undersigned on the 28th day of December 1994, for consideration of the Plaintiff's Motion in Limine to Prohibit Argument on Jurisdiction.

Bill Poleviayoma ("victim") was last seen on January 25, 1994 at a residence in Fort Duchesne, Utah. On May 20, 1994 the

victim's body was found at the Fort Duchesne Dump. The victim's body had suffered massive injuries to the head.

The parties agree that the residence is located within the Uintah and Ouray Reservation and that the dump is located outside the Reservation. Both locations are situated within Uintah County, State of Utah.

At the hearing the State proffered evidence that the victim was an enrolled member of the Ute Indian Tribe. The Defendant also proffered evidence that he is an enrolled member of the same tribe.

Counsel for the Defendant indicated that the Defendant does not contest the following facts advanced by the State: 1.

The victim dies as a result of a homicide; 2. The victim was taken directly from the residence to the dump; 3. The injuries to the victim's head occurred immediately after arrival at the dump; 4. The injuries to the victim's head were the result of someone intentionally striking the victim on his head with a heavy object. The Defendant does contest the State's theory that the victim was alive when he left the Reservation. Regardless of where death occurred, the Defendant also maintains that he did not cause the victim's death.

Assuming that either the victim or the Defendant is an Indian pursuant to 18 U.S.C. 1152, the State would not have jurisdiction to prosecute crimes committed

entirely within a reservation. The jurisdiction issue in this case depends entirely upon the location of the victim at the time of his death. If the victim died before leaving the Reservation, the State would not have jurisdiction. However, if the victim died after he left the Reservation, the State would have jurisdiction; whether the death occurred as a result of injuries which occurred on or off the Reservation. (U.C.A. 76-1-201(2)).

The jurisdictional issue in this case is not based upon a claim that either the residence or the dump is located outside the State of Utah. Both locations are clearly located within Uintah County and this Court has jurisdiction over all

locations within Uintah County. (State courts continue to exercise jurisdiction over crimes committed within "Indian Country" where the accused and the victim are both non-Indian.) Nevertheless, Federal law (18 U.S.C. 1152) would prevent the State from exercising it's jurisdiction within "Indian Country" where the victim and/or accused are Indian (as defined by case law). In such cases Federal and/or accused are Indian (as defined by case law). In such cases Federal and/or Tribal jurisdiction is based upon a finding that (1) the crime occurred entirely within Indian Country and (2) that the victim and/or Defendant are classified as Indian; not upon a claim that the crime occurred

outside the exterior boundaries of Utah.

Utah Code Annotated 76-1-501-(3) requires that "jurisdiction .... shall be established by a preponderance of the evidence". With respect to territorial jurisdiction, this requires that the State introduce evidence which proves by a preponderance of the evidence that the crime occurred within the exterior boundaries of this state.[1] Unless a defendant raises jurisdiction under section 1152, the State has no additional burden where an alleged offense occurred within an Indian Reservation.

The jurisdictional issue presented in this case does not arise until a defendant claims the State does not have jurisdiction

pursuant to Section 1152.[2] To raise the issue, the Defendant must set forth specific facts upon which he or she will rely. The facts must indicate: 1. That the Defendant and/or victim is an Indian for purposes of applying Section 1152; and, 2. The alleged offense occurred within a reservation. Defendant must produce sufficient information which would prima facie establish the above (facts which, if believed, would prove 1 and 2 above). If the Defendant has met his or her burden of raising the issue and has brought sufficient facts forward to establish a reservation and Indian status; then, in order to prove jurisdiction, the State must, (in addition to proving the offense

occurred within Utah), prove by a preponderance of the evidence that the Defendant and victim are non-Indian and/or that the crime did not occur within the designated reservation. In this case it does not appear that Indian status or reservation boundaries will be contested issues. Therefore, assuming the issue is properly raised by the Defendant; in order to establish jurisdiction in this case, the State must prove by a preponderance of the evidence: 1. The offense occurred within the exterior boundaries of the State of Utah; and, 2. the offense or some required element of the offense occurred outside the reservation. The issue of whether the State has met its burden of proving the

above is for the jury to decide. The Court will determine whether the Defendant has properly raised the issue.

When homicide is charged, U.C.A. 76-1-201(2) allows the State to meet its burden of proving jurisdiction by proving the body was located in the State of Utah. If the State proves by a preponderance of evidence that the body was located within Utah, the above statute provides a presumption that death occurred within Utah. If the underlying fact (location of the body) improved, the State may rely upon this presumption to meet its burden to prove the death occurred inside Utah and outside a particular reservation. The jury must decide whether or not the State has proved

the fact upon which the presumption relies. The Judge would determine whether the State has submitted sufficient facts to instruct jury as to the presumption (i.e. the State must introduce evidence, which if believed, would be sufficient to prove the underlying fact.) If the issue of whether the underlying fact has been proved is submitted to the jury, the jury would be instructed that if they find the underlying fact has been proved by a preponderance of the evidence, that fact would be sufficient to prove the crime occurred within Utah and outside the reservation.

The statutory presumption in this case is rebuttable. If the record contains credible evidence which indicates the death

occurred outside the State of Utah or inside a reservation, the State is not entitled to the presumption.

The statutory presumption in this case is rebuttable. If the record contains credible evidence which indicates the death occurred outside the State of Utah or inside a reservation, the State is not entitled to the presumption.

If credible evidence is introduced, the jury will not be instructed as to the presumption. It is for the Court to decide whether the evidence is sufficient to instruct the jury as to the presumption. In doing so the Court does not weigh the evidence but only determines whether, if believed, the evidence would indicate the

death occurred outside Utah and/or inside the Reservation. If the evidence is credible, the issue would be submitted to the jury without a presumption instruction. In all cases, the jury will decide whether the State has met its burden of proving jurisdiction.[3]

DATED this 5th day of January, 1995.

/s/
A. Lynn Payne,
District Court Judge

MAILING CERTIFICATE

I hereby certify that on Jan. 5, 1994 true and correct copies of the foregoing Ruling were mailed, postage prepaid, or were hand delivered to: Joann Stringham, Uintah County Attorney, 152 East 100 No., Vernal, Ut. And Jerome H. Mooney, 236 South 300 East, Salt Lake City, UT 84111.

By the undersigned

/s/ Jo Rasmussen
Deputy Clerk

FOOTNOTES

1.
Although, it has been the practice in Utah for the prosecution to submit the issue of jurisdiction to the jury as part of elements instruction, there is no requirement that this practice should continue. Jurisdiction is clearly not an element of any crime and need not be proved beyond a reasonable doubt. The jury may consider the issue of jurisdiction in a separate special verdict instruction where the jury is asked to specifically find whether the State has met its burden with respect to jurisdiction.

2.
In the United States, there are more than 200 Indian Tribes which have been recognized by the Federal Government. Indian status for the Defendant and/or victim may be based upon membership in any of these Tribes. In addition, the case law which has considered Indian status under section 1152 has held that Indian status may also be based upon an individual being recognized as being Indian by any group,

association, or society of Indians. There are many such organizations and groups throughout the United States. If the State had the burden to prove that each Defendant who committed an offense within a Reservation was not a member of any recognized tribe and was not recognized as being "Indian" by any association or group in order to establish jurisdiction, the State would be presented with an impossible task. In addition, the information which is required to determine Indian status is uniquely within the knowledge of the Defendant. Similarly, in a homicide case, the State may have no way of proving that a victim was non-Indian. It is therefore apparent that the Defendant must first raise the issue of jurisdiction under 1152 and that he can not do so by merely making a conclusory statement that he or she is an Indian, or that a particular location is within a reservation. Once a Defendant has appropriately raised these issues, the State would then have the burden of proving either that the offense did not occur on a Reservation or that the Defendant and the victim are non-Indian, by a preponderance of the evidence.

3.

In considering the affect of the presumption the Court notes U.R.E. 301 does not apply to criminal cases. Where the former rule applied to both civil and

criminal cases it appears that a conscious decision has been made not to shift the burden of proof from the State to the Defendant in criminal cases. The Court also notes that without the presumption it would be difficult in many homicide cases for prosecution to occur (because no State could prove that the death occurred in a particular jurisdiction). This presumption is constitutional, it does not relate to an element of the crime, and there is a rational basis between the underlying and presumed facts.

In The Eighth Judicial District Court
Of Uintah County, State of Utah

STATE OF UTAH,	:	
	:	
Plaintiff,	:	**RULING**
	:	
vs.	:	
	:	
VALENTINO COLOROW,	:	**Case No. 941800319**
	:	
Defendant.	:	

The Court has received the Plaintiff's Motion to Reconsider. From the motion it is apparent that there is confusion concerning the Court's prior ruling. In an attempt to clarify the issue for the Plaintiff, the Court will respond to the Plaintiff's request for specific rulings as follows:

1. Plaintiff' request: "That the issue of jurisdiction is a matter of law for the Court to decide, not the jury." RULING: It is the burden of the State in every case to establish by preponderance of evidence that the offense occurred within the State of Utah. This is a question for the jury to decide.

Where a defendant claims that the Court does not have jurisdiction pursuant to 18 U.S.C. 1152, the defendant bears the burden of properly raising this issue. In order to do so, the defendant must proffer specific facts upon which he or she will rely the facts must indicate: (1) That the victim and/or the defendant is an "Indian" for the purposes of applying Section 1152;

and (2) The alleged offense occurred within a reservation. The proffered facts must be such that they would prove 1 and 2 above. The Court must decide whether the issue has been properly raised. In this case, it does not appear there is an issue as to whether the defendant and/or the victim is an "Indian". Nor is there an issue as to whether a particular location is within a reservation. These issues would be issues for the Court to decide. However, in this case, there is a factual issue as to whether the victim died within a Reservation. Once 1152 jurisdiction is properly raised, the State must show that the offense, or some required elements of the offense, occurred outside the

Reservation. The State must do so by a preponderance of the evidence. This is also an issue which the jury decides.

(2) Plaintiff's request: "That the issue of jurisdiction must be decided prior to trial. This Court, not a jury, is required to make the necessary fact findings to decide jurisdiction."

RULING: See number one above.

(3) Plaintiff's request: "That in determining jurisdiction, this Court must apply the statutory presumption set forth as Section 76-1-201; Utah Code Annotated, which provides that in homicide cases, death shall be presumed to have occurred within the state, proving state jurisdiction to try the homicide case, if

the victim's body is found within the state."

RULING: The Court has already ruled that the issue of whether a crime occurred within the State of Utah is a jury question. The issue of whether a crime occurred outside a reservation is also a jury questions (assuming Section 1152 has been properly raised). It is the Court's opinion that the presumption (76-1-201(2)) should be applied as follows:

(A) The State must first introduce evidence, which if believed by the jury, would prove that the body was located within Utah (and, in Section 1152 cases, outside a reservation). If the State introduces such evidence, the State would

be entitled to a jury instruction which would instruct the jury that if they find that the body was located within Utah (and, in Section 1152 cases, outside a reservation), the State is entitled to rely upon the statutory presumption that the crime occurred within the State of Utah (and, in Section 1152 cases, outside a reservation). The judge must decide whether the State has introduced sufficient evidence to be entitled to this jury instruction. The jury would decide whether the state has proved the fact upon which the presumption relies.

(B) The statutory presumption is rebuttable. To rebut the presumption, the Defendant must introduce credible evidence

that the crime occurred outside Utah (and/or, in Section 1152 cases, inside a reservation). Credible evidence is evidence which, if believed by the jury, would establish that the offense occurred outside Utah (and/or, in Section 1152 cases, inside a reservation). The judge must make the initial determination as to whether the evidence would meet the above standard (i.e. whether credible evidence has been introduced). In doing so, the judge does not weigh the evidence, but only determines whether the evidence, if believed, would be sufficient to establish the above facts. If the Defendant does introduce credible evidence, the State would not be entitled to an instruction as

to the statutory presumption. In such cases, the jury would be instructed that the State bears the burden of proving the offense occurred within Utah (and, in Section 1152 cases, outside a reservation) by a preponderance of the evidence.

(4) Plaintiff's request: "Additionally, the State requests that as part of any supplementary or new order, this Court recognize that a determination of a jurisdictional issue by the Utah Supreme Court is of great importance to our area."

RULING: This Court concurs with the State's position that the issue of how jurisdiction is established will be a critical issue for the administration of justice within Uintah

and Duchesne counties. The Court anticipates that this issue will arise in hundreds of cases each year.

The ruling in this case does not supersede the Court's earlier ruling, and nothing herein is intended to overrule the Court's prior ruling.

DATED this 19th day of January, 1995.

/s/ A. Lynn Payne
A. Lynn Payne,
District Court Judge

I hereby certify that I caused to be mailed, postage prepaid, or hand delivered, a true and correct copy of the foregoing Ruling to Joan Stringham, 152 East 100 No., Vernal, Utah 84078 and Jerome H. Mooney,

Attorney for Defendant, 236 South 300 East, Salt Lake City, Utah 84111-2052.

DATED this 19th day of January, 1995.

/s/ Jo Rasmussen

IN THE EIGHTH JUDICIAL DISTRICT COURT
UINTAH COUNTY, STATE OF UTAH
---oooOooo---

STATE OF UTAH	:	
	:	CASE NO.
Plaintiff,	:	941800319FS
	:	
vs.	:	**PRELIMINARY HEARING**
VALENTINO COLOROW,	:	
	:	JUDGE A. LYNN PAYNE
Defendant.	:	

---oooOooo---

BE IT REMEMBERED THAT ON THE 26TH DAY OF AUGUST, 1994, THE ABOVE-ENTITLED ACTION NOW PENDING IN THE ABOVE-NAMED COURT, WAS HEARD BEFORE THE HONORABLE A. LYNN PAYNE, COMMENCING IN THE MORNING SESSION OF SAID DAY AT THE UINTAH COUNTY COURTHOUSE, VERNAL, UTAH.

APPEARANCES

FOR PLAINTIFF: MS. JOANNE STRINGHAM
MS. PATRICIA GEARY
COUNTY ATTORNEY'S OFFICE
152 EAST 100 NORTH
VERNAL, UTAH 84078

FOR DEFENDANT: JEROME H. MOONEY
ATTORNEY AT LAW
MOONEY & ASSOCIATES
236 SOUTH 300 EAST
SALT LAKE CITY, UTAH 84111

A. INSECT ACTIVITY ALONG WITH DECOMPOSITION, YES.

Q. AND SO WOULD IT ALSO THEN BE TRUE THAT YOU WOULD NOT BE ABLE TO DETERMINE WHETHER OR NOT THERE WAS PENETRATING INJURY TO ANY OF THE INTERNAL ORGANS IN THOSE SAME AREAS?

A. THAT IS CORRECT.

Q. WERE YOU ABLE TO DETERMINE FROM THE PORTIONS OF THE SKULL OF THIS INDIVIDUAL THAT YOU EXAMINED, WHETHER OR NOT THAT DAMAGE TO THE SKULL OCCURRED WHILE THIS INDIVIDUAL WAS STILL ALIVE OR AFTER HE WAS DEAD?

A. THERE IS -- I CANNOT TELL YOU SPECIFICALLY IN A VERY NARROW PERIMORTEM PERIOD. DID NOT APPEAR TO BE A DAMAGE THAT

OCCURRED AFTER A SIGNIFICANT POSTMORTEM INTERVAL, BUT IN THE PERIMORTEM PERIOD OF AN HOUR OR TWO I CANNOT TELL YOU.

Q. SO IF AN INDIVIDUAL IS ALREADY DEAD BUT IT'S WITHIN A RELATIVELY SHORT PERIOD FOLLOWING DEATH, INJURIES TO THE BONE FRAGMENTS ARE NOT GOING TO LOOK ANY DIFFERENT THAN THEY ARE IF IT HAPPENS AT THE TIME THE PERSON IS STILL ALIVE?

A. THAT IS CORRECT.

Q. AND DID YOU SAY THAT'S WHAT YOU FOUND PRESENT IN THIS BODY?

A. THAT'S CORRECT.

Q. WERE YOU ABLE THEN TO ATTRIBUTE THE MAJORITY OF THE DAMAGE THAT YOU SAW TO DAMAGE THAT OCCURRED EITHER AT THE TIME OF DEATH OR SHORTLY THEREAFTER?

A. IN THE PERIMORTEM PERIOD, YES.

(2)

No. 95-78

Supreme Court, U.S.
FILED
AUG 2 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

VALENTINO COLOROW,

Petitioner,

v.

THE STATE OF UTAH and JAN GRAHAM,
Utah Attorney General,

Respondents.

On Petition For Writ Of Certiorari
To The Utah Supreme Court

BRIEF IN OPPOSITION

JAN GRAHAM
Utah Attorney General
CAROL CLAWSON
Utah Solicitor General
J. KEVIN MURPHY
Assistant Attorney General
Counsel of Record
236 State Capitol
Salt Lake City, UT 84114-0810
Telephone: (801) 538-1021

Attorneys for Respondents

August 1995

BEST AVAILABLE COPY

QUESTION PRESENTED

Respondents frame the two questions presented by Petitioner Valentino Colorow (Pet. at i), as the single, following question:

Do federal due process principles allow a state court to decide its criminal jurisdiction before trial, utilizing a statutory jurisdiction-supporting presumption when the jurisdiction-supporting evidence is otherwise inconclusive?

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS TO DENY THE WRIT

I. THE UTAH SUPREME COURT'S OPINION IS NOT A FINAL JUDGMENT THAT CAN BE REVIEWED BY THIS COURT; SOUND JURISPRUDENCE ALSO COUNSELS AGAINST CERTIORARI REVIEW 5

II. COLOROW'S "DUE PROCESS" ARGUMENT RAISES NO IMPORTANT FEDERAL QUESTION; IT IS ALSO UNSUPPORTED ON THE MERITS 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Flynt v. Ohio, 451 U.S. 619 (1981) 5

In re Winship, 397 U.S. 358 (1970) 7

Lego v. Twomey, 404 U.S. 477 (1972) 8

Lucas v. United States, 163 U.S. 612 (1896) 8

North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 7

State and Graham v. Payne, ___ P.2d ___, 260 Utah Adv. Rep. 5 (Utah 1995). . . . . *passim*

Sandstrom v. Montana, 442 U.S. 510 (1979) 7

United States v. Lopez, ___ U.S. ___, 115 S. Ct. 1624 (1995) 7

United States v. Lossiah, 537 F.2d 1250 (4th Cir. 1976) 8

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Art. III § 2 4

U.S. Const. amends. V, VI, XIV § 1 4

18 U.S.C. § 1153 7

28 U.S.C. § 1257(a) 1, 2, 5

Utah Code Ann. § 76-1-201 (1995) 3, 8

Utah Code Ann. § 76-1-501 (1995) 2, 7

No. 95-78

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

VALENTINO COLOROW, Petitioner

v.

THE STATE OF UTAH and JAN GRAHAM
Utah Attorney General, Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Utah Supreme Court opinion for which petitioner Colorow seeks review, *State and Graham v. Payne*, has not yet been published in the Pacific Reporter. It is reported in the Utah Advance Reports, 260 Utah Adv. Rep. 5 (Utah March 21, 1995). The Utah court's slip opinion is reprinted in appendix A to Colorow's petition for certiorari, and for convenience of this Court, citations to the opinion in this brief will reference appendix A of Colorow's petition.

JURISDICTION

Although Colorow invokes this Court's jurisdiction under 28 U.S.C. § 1257(a) (Pet. at 2), the Utah Supreme

Court opinion for which Colorow seeks review is not a "final judgment" within the meaning of section 1257(a). Therefore, as explained in Point I of this brief, this Court lacks jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(a) states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Utah Code Ann. § 76-1-501 (1995) states:

> (1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

(3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence.

Utah Code Ann. § 76-1-201 (1995) states, in pertinent part:

(1) A person is subject to prosecution in this state for an offense which he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if:

(a) The offense is committed either wholly or partly within the state;

. . .

(2) An offense is committed partly within this state if either the conduct which is an element of the offense, or the result which is such an element, occurs within this state. In homicide, the "result" is either the physical contact which causes death, or the death itself; and if the body of a homicide victim is found

within the state, the death shall be presumed to have occurred within the state.

. . ..

Article III § 2 of the United States Constitution, and Amendments V, VI, and XIV § 1, invoked by Colorow, are set forth in his petition, at 2-4.

STATEMENT OF THE CASE

Colorow's detailed case statement (Pet. at 4-11) accurately recounts the proceedings to date in his noncapital state murder and kidnapping prosecution. Colorow challenges the Utah Supreme Court's holding, in granting the mandamus writ sought by the State, that state trial courts must decide criminal jurisdiction before trial, as a non-final matter, aided by the statutory presumption of jurisdiction in the territory where a murder victim's body is found. This pretrial determination, the Utah court held, is made without the assistance of a jury. *State and Graham v. Payne*, Pet. App. A at 31-32 & n.7.

For purposes of deciding whether to grant the writ, respondents highlight two features of this case: *First*, the state trial court has not yet decided jurisdiction under the procedure mandated by the Utah Supreme Court; accordingly, the case has not proceeded to trial. *Second*, under the evidence known to date, it cannot be positively determined whether the murder victim, Bill Poleviayoma, died within Indian Country or in state territory; it is undisputed, however, that Poleviayoma's body was found within state land (the "Gusher dump"), not in Indian Country.

REASONS TO DENY THE WRIT

I

THE UTAH SUPREME COURT'S OPINION IS NOT A FINAL JUDGMENT THAT CAN BE REVIEWED BY THIS COURT; SOUND JURISPRUDENCE ALSO COUNSELS AGAINST CERTIORARI REVIEW

Under 28 U.S.C. § 1257(a), this Court has jurisdiction to review "*final judgments or decrees* rendered by the highest court of a state" by writ of certiorari (emphasis added). While the opinion for which Colorow seeks review was issued by Utah's highest court, it is not a final judgment. This conclusion is compelled by the fact that the murder and kidnapping prosecution against Colorow must yet proceed through several stages before any final resolution of the case will be achieved. *See, e.g.*, *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (no final judgment when anything remains to be decided by state courts; finality of criminal case normally defined by guilty verdict and imposition of sentence).

Indeed, the rule for determining state court jurisdiction established by the Utah Supreme Court, which Colorow would have this Court review, has not yet been applied to Colorow. Under the procedure mandated by the state supreme court, the trial court may yet dismiss the prosecution for lack of jurisdiction. *See State and Graham v. Payne*, Pet. App. A at 32-33. And even if the trial court finds that it has jurisdiction, Colorow may have substantive defenses that will secure an acquittal on the murder and kidnapping charges. Only if the proceedings yet to be held (including an appeal of right in the Utah appellate system if convicted) are resolved

adversely to Colorow will there exist a final judgment that this Court could review by writ of certiorari.

Even if this Court decides that it has jurisdiction, sound jurisprudence counsels against granting certiorari review. For one thing, Colorow has *not*, to date, squarely challenged state court jurisdiction over his criminal prosecution; he has filed no motion to dismiss. Instead, Colorow has only stated an intention to produce jurisdiction-defeating evidence at trial:

> Although the Medical Examiner stated at the preliminary hearing that he could not determine with any certainty whether or not the wounds inflicted in Indian Country, or the wounds inflicted at the dump, resulted in the death of the defendant [sic: victim], (P.H. Tran. at 25), testimony will be presented at trial that the victim was in fact dead at the time he was loaded into the trunk which undisputedly took place on the reservation.

(Resp. to Pet. for Extraordinary Writ, Utah Sup. Ct. No. 950042, at 6). Colorow has not yet produced any evidence that Poleviayoma actually died in Indian Country.

Under these circumstances, there really is no proper Article III "case or controversy" before this Court. And because Colorow may defeat state court jurisdiction under the procedure mandated by the Utah Supreme Court, a grant of federal certiorari review at this point could result in an advisory opinion. It would certainly amount to premature intrusion into state affairs, and raise a risk of piecemeal litigation. This Court disapproves of such practice. *See, e.g.*,

North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973).

II

COLOROW'S "DUE PROCESS" ARGUMENT RAISES NO IMPORTANT FEDERAL QUESTION; IT IS ALSO UNSUPPORTED ON THE MERITS

Colorow inaccurately contends that the existence of differing state procedures for deciding criminal jurisdiction creates an important federal question (Pet. at 12-20). *See* R. Sup. Ct. 10.1(b). Federalism principles inherently contemplate that individual states will develop differing ways of administering justice--including different ways of deciding state court jurisdictional disputes. *See United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624, 1626 (1995) (describing "first principles" of federal system). And Colorow does not argue that Utah's procedure for deciding jurisdiction in this case encroaches upon federal Indian Country jurisdiction, conferred by 18 U.S.C. § 1153. In short, Colorow raises no federal question that requires review by this Court.

Further, Colorow's proposed argument to this Court lacks merit. In effect, Colorow wants this Court to overrule or amend Utah Code Ann. § 76-1-501(3) (1995), which states that jurisdiction is not an element of state criminal offenses, and need only be proven by a preponderance of the evidence. To support that argument, he misrelies on *In re Winship*, 397 U.S. 358, 362 (1970), and *Sandstrom v. Montana*, 442 U.S. 510 (1979) (Pet. at 22-23). Those cases do not address jurisdiction. Rather, they deal with the cornerstone principle that the *elements of crimes* must normally be proven beyond

reasonable doubt, and without resort to presumptions. More on-point, and running against Colorow's due process claim, is *Lego v. Twomey*, 404 U.S. 477, 486-87 (1972), holding that the question whether a confession was voluntary, and therefore admissible at trial, is only subject to the "preponderance of evidence" standard. The jurisdictional dispute in this case, which really amounts to a decision which forum--state or federal--will try Colorow, surely can be legitimately decided under Utah's standards.

Colorow also challenges Utah Code Ann. § 76-1-201(2) (1990), which creates the presumption of jurisdiction in the territory where a homicide victim's body is found. This statute comes from the American Law Institute's Model Penal Code. MODEL PENAL CODE § 1.03(4), at 33-34 (1985) (quoting the model statute). The model code's notes explain that such statutes are intended to "to prevent abortion of the prosecution in cases where the body of the victim is found within the state but it is unclear where the death, injury, or conduct occurred." *Id.* at 63-64 & nn. 99-101. Similar statutes have been adopted by many states, *see id.* at 65 & n. 104. Colorow cites no instance in which a court has declared such a statute unconstitutional; nor are respondents aware of any such case.

In fact, "abortion of the prosecution" is really what Colorow seeks. By making it more difficult for the state courts to gain jurisdiction, a gap would open between state and federal criminal jurisdiction. Federal courts deem Indian Country jurisdiction an element of the crime, to be proven beyond reasonable doubt, so that an "acquittal" could result for lack of jurisdiction. *See Lucas v. United States*, 163 U.S. 612, 616-17 (1896); *United States v. Lossiah*, 537 F.2d 1250, 1251 (4th Cir. 1976). Similarly restrictive standards for

proving state court jurisdiction would allow Colorow to challenge jurisdiction in both federal and state court; if jurisdiction could not be proven in either forum, Colorow could evade justice regardless whether he is guilty or not guilty of the charged crimes. Due process, rationally viewed, surely does not require such an unjust result. The Utah Supreme Court's ruling properly narrows this jurisdictional gap, reducing the prospect of such a result.

Finally, the State of Utah has never, at any stage in Colorow's prosecution, sought to evade or undermine the principle that Colorow's guilt must be proven beyond reasonable doubt. Upon trial in the state court (assuming the case proceeds that far), the State will be mindful of, and obedient to, that cornerstone due process obligation.

CONCLUSION

For the foregoing reasons, Colorow's petition for writ of certiorari should be DENIED.

JAN GRAHAM
Utah Attorney General

CAROL CLAWSON
Utah Solicitor General

J. KEVIN MURPHY
Assistant Attorney General
Counsel of Record

August 1995